United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7201

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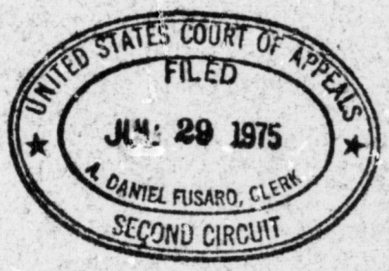
Docket No. 75-7201



HOTAFT MANAGEMENT CORPORATION,

Plaintiff-Appellant

-against-

AMERICAN TELEPHONE & TELEGRAPH CO. and THE NEW YORK TELEPHONE COMPANY,

Defendants-Appellees.

B

APPEAL OF AN ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING PLAINTIFF'S CAUSE OF ACTION.

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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ON THE BRIEF

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REPLY BRIEF FOR PLAINTIFF-APPELLANT -
HOTAFT MANAGEMENT CORPORATION

Preliminary Statement

It is obvious from the reading of the appellant's statement of the case that the facts presented are in sharp dispute with reality; defendant-appellee, New York Telephone Company, (hereinafter referred to as New York Telephone Co.) has made serious and hopefully, not willful mistakes. The Telephone Company has stated that information regarding the financial status of the plaintiff-appellant was requested from the said appellant. The New York Telephone Company, however, has neglected to advise the Court that this financial information was requested in early September, 1974, when the appellant first took possession of the property known as the Hotel Taft, and that the information as requested was provided immediately and voluntarily by the appellant to the Telephone Company. Based upon the receipt of this substantial information, the New York Telephone Company, through its agent, a Mr. S. P. Akin, contractually and in writing (emphasis supplied) agreed to provide all necessary telephonic communications including the substantial interstate "hook ups" which are the life line to the hotel industry and the appellant in turn agreed to provide the sum of $30,000.00 as its full and total obligation under the New York State tariff for a security deposit.

The appellant has fully performed all obligations under that agreement until that agreement was unilaterally and completely breached by the Telephone Company.

In its previous submissions to this Court, the Telephone Company has stated that the previous owner of this hotel is indebted to the Telephone Company in the sum of $18,000.00, and has attempted to pursuade the Courts that the plaintiff-appellant is in some way connected or obligated for this sum. Obviously, nothing could be further from the truth. The present ownership of the Hotel Taft has obviously no connection with the previous ownership. Despite this however, it should be pointed out that this sum of $18,000.00 is presently the subject matter of a substantial dispute between the previous owner and the Telephone Company; and that this dispute was well known and much discussed between the previous owner and the Telephone Company prior to the purchase of the hotel by the present ownership. The previous owner has claimed that this sum is the result of an improper and unjustified overcharge by the Telephone Company due to its own inefficiency and faulty administrative procedures; it is further enlightening to know, that although this sum is in dispute for more than one year, the Telephone Company has not been able to maintain its claim, nor obtain any judgement in regards to this. It is most interesting to note that there are many organizations of this country whose sole function is to determine all over charges made by the Telephone Company to its customers and whose services are provided on a purely contingent basis based on the amount of over charges proved.

The New York Times is a reputable newspaper. It has provided an article that could not have been verified nor subject to any reasonable or diligent investigation as to its accuracy. This article is attached to plaintiff-appellant's appendix, pg. 35/37. The article was inaccurate in many respects, which inaccuracies were conveyed to the Telephone Company on several occasions.

Certainly an unverified newspaper article does not form a basis upon which the law will recognize a breach of a written contract freely entered into by two parties, the foundation of which was the correct and proper information provided to the New York Telephone Company by this plaintiff-appellant. In passing, it must be pointed out that this same newspaper, The New York Times, has, in the past six months printed no less than five articles regarding the New York Telephone's inept billing and inaccurate records resulting in substantial overcharging to its large corporate clients.

That the information obtained by the Telephone Company is subject to frequent error and inefficiency can be clearly illustrated by its inability to locate plaintiff's certificate of incorporation in the State of New York, a fact readily admitted in appellee's brief (3). This certificate is a matter of public record maintained by the Secretary of State and available to any person or organization. A copy of such statement is attached to appellant's-appendix (59) and which certificate clearly indicates that the appellant was incorporated on September 10, 1974.

There has never been any hearing before any public service commission and except for an informal conference at which no

record was taken, no minutes were permitted and during which no testimony was taken.

At that informal hearing, the "referee" did not comprehend the implications of the legal contract entered into between the parties regarding the security deposit. Further, appellant's-appendix (41, 42) indicates that the proceedings were "informal hearings" and that the Telephone Company had advised the appellant "that the previous agreement was no longer in effect."

Argument

I.

APPELLANT'S COMPLAINT WAS IMPROPERLY DISMISSED.

The Telephone Company throughout its entire brief, and in fact, throughout its entire proceedings speaks at length of the New York State tariff and its validity. This tariff is not (emphasis supplied) the basis or the subject matter of this dispute at all.

The precise subject matter of the plaintiff's complaint is founded primarily on a breach of a written contract by the Telephone Company. The plaintiff contends that no matter how wealthy and powerful the Telephone Company might be, it freely entered into a valid, bilateral contract with the plaintiff and it cannot, now under any law, at its will, arbitrarily and unilaterally terminate that contract. The basis for jurisdiction in this matter rest on all fours that a prior decision rendered by this very Circuit Court of Appeals in the IVY Broadcasting Company, Inc. Vs. A T & T, 391, F. 2nd 486, 490 (Sec. Cir. 1968) where it was stated "a Federal Court has jurisdiction over a claim for

negligent and breach of contract (emphasis supplied) in the rendition of interstate telephone service....."

The Telephone Company's action as a result of this breach of contract was not properly put forth in its brief, to wit; the interuption of outgoing local service, but rather a disruption of incoming service, a minimum of 80% of which represents interstate communications and commerce originating unknown third parties throughout not only the U.S., but the world. The Telephone Company has threatened to interupt incoming calls is acting contrary to the laws and statutes of the Congress of the United States and in total interference in interstate commerce and communication; that these acts of the Telephone Co. are further in violation of the various anti-trust statutes and of the Constitution of the United States.

The complaint as submitted to the Lower Court was good and sufficient under the Rules of Federal Civil Practice, and that the Lower Court acting on its own motion in dismissing this complaint has done so in an apparent total misunderstanding on the basis and nature of the appellant's action in the complaint. It must further be noted that a motion or an argument directed at the sufficiency of the complaint was not presented by the defendant's-appellee in the Lower Court and that it must be construed that the New York Telephone Company impliedly admitted the propriety and the validity of the complaint.

The cases presented and the authorities sited by the defendant's-appellee, are totally inapplicable to this situation as the validity of the deposit tariff does not form the basis of this action and therefore, the primary jurisdiction of this matter does not fall in New York State.

These points were previously discussed at length in appellant's brief and it is respectfully suggested that the order of the Lower Court was improper and should be reversed.

2.

THE FEDERAL DISTRICT COURT HAS JURISDICTION OVER THIS ACTION.

The main issue in appellant's complaint is not one concerning the validity of public service commission rates chargeable by the Telephone Company but are whether the New York Telephone Company and its parent American Telephone & Telegraph acting in unison to exert a total monopolistic grip over the entire field of interstate communications may validly and effectively and unilaterally breach a contract with its customers, which said contract is in effect founded upon the authorization set forth, and thereafter totally disrupt, and in fact isolate the plaintiff from any interstate commerce and communications. The basic issue is one of Federal common law, to wit; contract and its resultant intrusion into the Federally regulated area of interstate communications.

The basic premise of the New York Telephone Company, that this action is totally local in nature, cannot stand. If the plaintiff in this action were to be precluded from applying to the Federal Court for the relief to which it is justly deserving, the defendant-appellee, the New York Telephone Company, would have effectively limited Federal jurisdiction in an area over which the interstate commerce clause in the U. S. Constitution, as well as all of the powers and legislation derived therefrom, had granted exclusive jurisdiction.

The damages in this particular case are due to the arbitrary action of the defendant-appellee, solely against the interstate character of the appellant. As previously discussed, the IVY Broadcasting case (see Infra) was determined not as indicated in the appellee's brief, but rather to specifically prevent excesses to which this appellant is being subjected by the cooperative efforts of both appellees.

Obviously, The Johnson Act, 28 U.S.C. Sec. 1342, is totally inapplicable to this situation, as the appellant is not contesting "any order effecting rates chargeable by public utility," but is founding its entire situation upon a breach of a contract under Federal common law and the resulting interference by the appellees with the appellant's ability to engage in interstate communications and commerce.

Conclusion

For the reasons above stated and previously put forth in plaintiff-appellant's principal brief, the decision of the Lower Court should be reversed.

Dated: July 25, 1975

New York, New York

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